WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **5566/20**
Applicant: **Guy Gray Goodwin**
Respondent: **G & C Building Pty Ltd**
Date of Determination: **8 February 2021**
Date of Amendment: **17 February 2021**
Citation No: **[2021] NSWWCC 42**

The Commission determines:

1. Award for the respondent in relation to the allegation of consequential lumbar spine condition resulting from injury to right shoulder on 30 November 2016.

A brief statement is attached setting out the Commission's reasons for the determination.

Josephine Bamber
Senior Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. On 30 November 2016, Guy Goodwin sustained an injury to his right shoulder when he was shifting a beam in the course of his employment with the respondent, G & C Building Pty Ltd. The respondent does not dispute this injury occurred. However, Mr Goodwin alleges that he sustained a consequential condition in his lumbar spine as a result of treatment he undertook for the right shoulder. That treatment involved hydrodilatation, physiotherapy and use of home-based pulley system.

2. The claim for compensation in these proceedings is confined to a claim pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act) for incurred treatment expenses. The Application to Resolve a Dispute (ARD) was amended to delete the reference to the Medicare expenses and the amount being claimed was amended to $2,792.25 as set out in the chart at pages 748 and 749 of the ARD. From the items in that chart the two consultations bearing the date of treatment of 23 March 2018 were deleted. Mr Goodwin's counsel confirmed all of the other claimed treatment expenses relate to the lumbar spine condition.

3. The respondent's counsel confirmed the issues in dispute relate to whether Mr Goodwin sustained a consequential lumbar condition and, if so, whether the treatment claimed was reasonably necessary treatment as a result of such a consequential condition.

PROCEDURE BEFORE THE COMMISSION

4. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

5. The matter proceeded in Arbitration hearing on 30 November 2020 via an audio-visual platform due to the COVID19 situation. Mr Ty Hickey, counsel, appeared for Mr Goodwin instructed by Mr Anthony Prior, solicitor. The respondent was represented by Mr Campbell Robertson, counsel, instructed by Ms Hannah Whiting, solicitor and Mr Michael Rafferty from the insurer.

6. Both counsel made oral submissions which were sound recorded, and a copy of the recording is available to the parties. A written transcript (T) was made from the sound recording.

EVIDENCE

Documentary Evidence

7. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) The ARD and attached documents;
    (b) Reply and attached documents;
    (c) Application to Admit Late Documents filed on behalf of Mr Goodwin dated 25 November 2020, and
    (d) Records from Mr Young, osteopath.

Oral Evidence

8. There was no oral evidence.

FINDINGS AND REASONS

9. Both counsel made extensive submissions referring in considerable detail to the medical and lay evidence before the Commission. The transcript of those submissions numbers 85 pages. I have summarised both Counsel's submissions below and, in my determination, I have set out the key aspects of the lay and medical evidence in chronological order which has helped to understand the totality of the evidence.

Mr Goodwin's submissions

10. To support a causal connection with the treatment prescribed and performed for the right shoulder injury and the development of a lumbar spine condition, Mr Goodwin's counsel relies on the following evidence:

    (a) Mr Goodwin's statements.
    (b) The clinical records of Dr Edwards, general practitioner.
    (c) Physiotherapy records.
    (d) Dr Kumar's reports.
    (e) Dr Ferch's reports.
    (f) Dr Tame's reports.
    (g) Other treatment records.
    (h) Dr Bodel's reports.

11. Counsel made the submission that Mr Goodwin sustained an injury to the right shoulder which involved a detached bicep with supraspinatus tendon damage and surgery was undertaken by Dr Kumar on 23 December 2016. It was noted that after the surgery Mr Goodwin had increasing pain and stiffness in his right shoulder and he underwent the hydrodilatation procedure on 12 April 2017. After the initial surgery and this procedure Mr Goodwin underwent intensive physiotherapy treatment. It was submitted that part of the physiotherapy treatment after the hydrodilatation procedure was that he use a pulley system at home.

12. Mr Goodwin's counsel referred to the statements noting that Mr Goodwin had complained of tightness in his back after the initial surgery and during the following physiotherapy treatment he had pain including in the lumbar spine. After describing how the pulley system worked, counsel referred to Mr Goodwin's statement in which he said the stretching from the use of the pulley system improved the range of motion in his shoulder, but it placed pressure on his back and the pain there worsened and became chronic. Counsel drew attention to Mr Goodwin's statement where he describes developing pain in his left buttock radiating down the leg into the foot, causing extreme cramping.

13. In addition to referring in detail to Mr Goodwin's statements regarding the treatment he has undertaken for his lumbar pain, his counsel submits that this account is supported by the entries in the various treating records. Attention was also drawn to the fact that Mr Goodwin told the insurer's claims officers that he was experiencing back pain and he was encouraged to lodge a separate claim in relation to his back as a result of the nature and conditions of his employment with the respondent even though his general practitioner commented that Mr Goodwin did not have a history of needing treatment for back pain until after the treatment following the hydrodilatation procedure.

14. Counsel made detailed submissions regarding the treatment of the right shoulder leading to the pulley system being prescribed, making reference to the reports of Dr Kumar and the

physiotherapist. It was noted in a clinical entry in the physiotherapist's notes for 17 July 2017 that there is a reference that Mr Goodwin was taking pain medication for his back.[1] It was submitted that the preceding notes of the physiotherapist do not refer to back pain, yet he submitted in this entry the physiotherapist seems to accept there had been back pain. Attention was drawn to the general practitioner's notes for 26 July 2017[2] wherein the doctor records development of right lower thoracic/ upper back muscle tightness and that the physiotherapist has been providing massage for this. It was also submitted that Dr Edwards also noted that "the manual physio to work out shoulder scar tissue has likely caused this back muscle irritation".

15. Mr Goodwin's counsel also relied on the Advanced Physiotherapy report from Mr Cameron Bulluss and Mr Christopher Hook dated 17 August 2017 referring to "reduced in internal rotation to L3".[3] However, I infer this is a reference to the degree of movement of the right shoulder because that paragraph when read in full is confined to the range of shoulder movement. Counsel noted that further down the report it was noted that Mr Goodwin had been presenting for the past few weeks with pain in the lumbar spine, left inguinal region and occasionally the left lateral calf and foot, which he claimed had been present since the hydrodilatation procedure. It was also noted that the physiotherapist opined that "Assessing Guy's lumbar spine has been challenging but it is clear that the back is involved, with a significant reduction in lumbar flexion". Counsel submitted that even though the opinion was expressed that there was no direct link between the back pain and the hydrodilatation procedure, the authors did not deal with the use of the pulley system and the effect of that on Mr Goodwin's back.

16. Counsel submitted that the history in the general practitioner's records on 23 August 2017 is that Mr Goodwin was finding that extended car travel was affecting his lumbar region from L2 to L4 and that doctor noted that "All started with intensive exercises after hydro to improve shoulder ROM ? lumbar muscle injury related to shoulder exercises? Z joint irritation secondary to this...[4]"

17. When dealing with Dr Kumar's opinion Mr Goodwin's counsel submitted that the report dated 12 September 2017 records "Unfortunately after his hydrodilatation and therapy, he has noticed an increase pain across his back which is becoming increasingly debilitating." It was noted that Dr Kumar thought as this pain occurred during treatment for his work-related shoulder injury, it is reasonable it should be considered under the WorkCover scheme and that Dr Kumar referred Mr Goodwin for an opinion from a spinal specialist, Dr Ferch[5].

18. Reliance was also placed on the general practitioner's entry on 13 September 2017 that left lower back pain continues and worsens and "seemed to signif[icantly] increase after physio session aiming to reduce lower back m[uscle] spasm.[6]"

19. The clinical entry of Dr Edwards for 21 September 2017 was summarised by counsel and it was noted that it has a history "seems like course of events was sudden onset of radicular back pain after post-hydrodilatation physio and stretching". Counsel also noted that the doctor refers to Mr Goodwin having no chronic history of repeated back pain or radicular pains, except for one episode of sciatic pain about 25 years ago which he said had fully resolved. It was recorded by Dr Edwards that the changes on the MRI scan were on par with a 50-year-old builder and that the time course suggested an event related to the therapy following the hydrodilatation procedure[7]. It was also observed by counsel that Dr Edwards

[1] ARD p 565, T18.19 ff.
[2] ARD p 65.
[3] ARD p 601.
[4] ARD p 65, T20.
[5] ARD p 200, T21.
[6] ARD p 67.
[7] ARD p 68.

issued a request for a CS injection of the left L5/S1 facet joint, noting radicular pain to the left groin.[8]

20. Counsel noted the general practitioner's entry on 4 October 2017 states that it "seems the back muscle strain/spasms were initiated in the post-hydrodilatation therapy to increase the shoulder range of motion, and that this therapy was quite physical" and there were no previous similar back issues with similar pains[9].

21. The report from Dr Ferch dated 10 October 2017 was quoted by counsel, wherein the doctor refers to the pulley system exercises for the right shoulder injury and that Mr Goodwin experienced lower back pain while undertaking these exercises[10]. Dr Ferch noted that Mr Goodwin underwent physiotherapy and traction massage for his back, but he still has been troubled by increasing lower back pain in addition to pain radiating to his left lower limb. At that stage Dr Ferch sent Mr Goodwin for nerve conduction studies because he could not see the basis for his pain on the MRI scan. However, as counsel submits, Dr Ferch in his further report dated 24 Janaury 2018[11] states that the recent MRI scan does demonstrate a sequestered disc fragment at L5/S1 and this was on the left side which the doctor said could be associated with irritation to the descending nerve root. Dr Ferch noted Mr Goodwin was to undertake some injection treatments around the hip.

22. The results of the nerve conduction tests were referred to by Dr Ferch in his report dated 28 November 2017 as demonstrating L5/S1 radiculopathy. Counsel noted that the general practitioner has stated in his clinical notes that Dr Ferch was seeking permission from the insurer to have a further MRI scan of the hip to guide treatment such as stretching, traction, massage and acupuncture[12]. Dr Ferch also referred Mr Goodwin to Dr Simon Tame, pain management specialist.

23. Counsel drew attention to the reports of Dr Tame dated 19 Janaury 2018[13] which noted persistent left buttock and leg pain and he recommended a series of diagnostic and therapeutic injections be undertaken.

24. In terms of causation of the back problem, the history in the referral to Michael Hook dated 4 April 2018 also refers to the L5/S1 radiculopathy that seemed to occur following the rehab stretching after the hydrodilatation procedure for the right shoulder.[14]

25. Detailed submissions were made about the Dr Edward's entry on 19 April 2018 which involved a meeting with the insurer's claim's officer[15]. It was submitted that it was the claims officer who doubted a connection with the hydrodilatation procedure and the development of back pain, and she was of the view that the most likely explanation was an exacerbation of a pre-existing back condition given his type of work. Counsel noted that Dr Edwards, however, recorded that he did not have in his notes any regular entries about back pain or referrals to physiotherapy that would indicate Mr Goodwin had back disease. The doctor noted the back pain came on at the time of the hydrodilatation procedure and the subsequent stretching with the pulley system. A further entry on 14 March 2019 noted that Mr Goodwin had many years of trouble-free labour work before the sudden deterioration of the back pain and so the insurer's claim of a long-term problem does not make sense, according to Dr Edwards.

[8] ARD p 69.
[9] ARD p 70, T22.7.
[10] ARD p 202.
[11] ARD p 204, T23.30
[12] ARD p 71 in entry of 30 November 2017.
[13] ARD pp614 and 616.
[14] ARD p 435.
[15] ARD p 78.

26. Mr Goodwin's counsel thereafter submitted about various treatments that Mr Goodwin undertook for his lumbar spine from Dr Tame, Mr Freeman and Mr Young, the osteopath.[16]

27. In relation to Dr Bodel's reports, Mr Goodwin's counsel submitted the doctor's opinion should be accepted that Mr Goodwin had sustained a consequential condition of a L5/S1 disc rupture following the hydrodilatation procedure and the management of the right shoulder injury. The passage in the second report of Dr Bodel was relied upon wherein the doctor stated that Mr Goodwin's back was in a twisted position when using the pulley and the secondary back condition arose as a result[17]. Dr Bodel's final report was addressed in detail to support the submission that the claimed incurred treatment expenses were for reasonably necessary medical treatment.[18] Counsel submitted about the legal authorities such as *Diab v NRMA Ltd*[19] in relation to the requirement in section 60 of the 1987 Act for treatment to be reasonably necessary treatment. I have not summarised these submissions, as they have been recorded in the transcript[20], and, for reasons given below, I have found that Mr Goodwin has not discharged his onus of proof that he did sustain a consequential lumbar condition.

28. Mr Goodwin's counsel submitted that no reliance should be placed on Dr Miniter's reports, excepting that he did find in the mid part of 2017 Mr Goodwin sustained a disc prolapse in his lumbar spine. However, counsel criticised Dr Miniter's opinion that work was not a substantial contributing factor because this is not the legal test and secondly, he does not explain how he reached that conclusion. Counsel noted that Dr Miniter was of the view that Mr Goodwin's back was improving but seemed to support the injection therapy if there was no improvement. So, it was argued that if Mr Goodwin's submissions prevailed in relation to the consequential condition there should be a finding that the treatment undertaken at the recommendation of Drs Ferch and Tame for the injections was reasonably necessary treatment.

29. In relation to Dr Miniter's view that the back condition was longstanding, it was submitted that the doctor also stated that there was an acute episode in 2017. Also, it was submitted that Dr Miniter only refers to a single episode of prior back pain 25 years ago. Dr Miniter's subsequent opinions in his supplementary reports were criticised because the doctor had only examined Mr Good win the once and he later refers to conversations with Mr Goodwin, months earlier in his consultation. The tenor of this submission was that Dr Miniter's opinion was unreliable. Inconsistencies were also pointed out in relation to the first history of only one back issue 25 years ago and then the problems in the lumbar spine being longstanding. Counsel also argues that Dr Miniter did not explain why he felt the lumbar problem was not related to the physiotherapy treatment after the hydrodilation procedure.

30. It was also submitted that Dr Miniter has expressed the view, without citing any literature, dismissing the concept of consequential conditions.

31. Mr Goodwin's counsel also submitted that the general practitioner's notes had contemporaneous histories about Mr Goodwin's experience with Dr Miniter, that he was minimally examined, and the doctor was adversarial and had a poor opinion of pain management approaches[21].

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[16] T29-30.
[17] ARD p 43.
[18] T 43.
[19] [2014] NSWWCCPD 72, *Diab*.
[20] T T43-44.
[21] ARD p 78.

Respondent's submissions

32. The respondent's counsel also went through the statements of Mr Goodwin in detail. He accepted that the pulley exercise for the right shoulder was a well-known modality of treatment for shoulder conditions[22]. He submitted that the treatment protocols after the hydrodilatation procedure were identical to that performed beforehand. Counsel submitted that the history that Mr Goodwin wants the Commission to believe, and that stated by Dr Edwards, is that after the hydrodilatation procedure Mr Goodwin's back pain worsened from that he had previously experienced as he developed pain in his left buttock radiating through his leg into his foot, and that this pain came on within 48 hours of undergoing the hydrodilatation where he was extensively using a pulley for physiotherapy.

33. The respondent submitted that the clinical records show that Mr Goodwin had hip pain and tightness in 2013[23] and on 9 May 2014 it is recorded that he suffered from pain in the coccyx sacrum for three months and had a "past history of L4/5 pain and tightness, coccygeal pain sacrum L4/5."[24] Back pain was also noted in the entry on 4 July 2014 with tenderness in the distal coccyx, L5/S1 joints, coccyx L3, L4 and L4/5 disc fissures and it was noted Barry Freeman was helping with core strength. The respondent submitted that there were no further entries until 26 July 2017[25] in relation to the low back until after the right shoulder injury. He argued that Mr Goodwin's statement that he experienced back pain between December 2016 and the hydrodilatation procedure is not borne out by the general practitioner's records.

34. It was further submitted that the hydrodilatation took place on 12 April 2017 and in his statement Mr Goodwin said within 48 hours he had severe pain and cramping yet when he saw Dr Edwards on 26 April 2017 this is not mentioned, nor was it mentioned in the consultations on 19 May 2017 and 28 June 2017. It is submitted the first mention is on 26 July 2017 however counsel argues that Dr Edwards does not refer to the use of the pulley system as being the cause of the back pain.

35. It is argued that Mr Goodwin, having had a prior workers compensation claim for his left shoulder, would be well aware of the need to tell the doctor what was wrong with him. It is submitted that there is no explanation for the absence of a contemporaneous history of back and leg pain for three and a half months after the hydrodilatation procedure.

36. It was argued that there was another inconsistency in that leg pain is not mentioned even in the consultation on 23 August 2017 where there is an entry of "no radiating down to leg" and "no stabbing quality".[26]

37. The respondent's counsel also drew attention to the entry in September 2017 where Dr Edwards postulates that the back symptoms could be related to December physical labour and the alteration in his posture following the shoulder injury. And also the doctor notes that the physiotherapist did not see acute back issues after the shoulder therapy, with Dr Edwards also noting that a manual worker could have an increased risk of disc and back disease[27].

38. The respondent argues that there is nothing in the physiotherapy notes about back pain that precedes the hydrodilatation procedure even though Mr Goodwin started to use the pulley system before then in February 2017[28], although he does acknowledge there is reference to

[22] T47.25.
[23]ARD p 52.
[24] ARD p 53.
[25] ARD p 65.
[26] ARD p 66.
[27] ARD p 68.
[28] ARD pp538- 541.

tightness through the back on 20 March 2017. He said the entry on 1 March 2017 to tightness in the back was in the context of Mr Goodwin having woken in an awkward position[29].

39. Counsel submits that the physiotherapy treatment before the hydrodilatation procedure involved exercises six days a week, five times a day and also commencing on a rowing machine for 5 to 15 minutes per day. It was noted the physiotherapy treatment following hydrodilatation started within an hour of that procedure and the therapy regime was the same as previously. Counsel said the physiotherapist's notes need to be cross-referenced with Mr Goodwin's statement that within two days he felt intense pain and severe cramping in his left leg, but there is no word of this to the physiotherapist or to Dr Edwards. And on 23 June 2017 the physiotherapist records "everything going well, no issues"[30]. Furthermore, counsel submits the physiotherapist's report to Dr Kumar dated 16 June 2017 refers to Mr Goodwin making good progress and with his hand behind his back he is still a bit restricted to L3. Counsel says this is not a reference to back pain but the level of the back that Mr Goodwin can reach with his hand[31]. He argues this is consistent with the clinical notes not recording back or leg pain on 16 June 2017.

40. On 17 July 2017 the physiotherapist does record Mr Goodwin had been taking pain medication for his back and hip, but the respondent's counsel submits there is no mention of left leg pain extending to the foot. It is argued that on 4 September 2017 when the entry does refer to radiation of pain it is on the right side not the left and that this is repeated in the entry on 5 September 2017. Furthermore, it is submitted on 13 September 2017 it is recorded "there's referred pain from the low back onto the right groin and posterior hip that supposedly started the day after the hydrodilatation"[32].

41. Counsel submitted that the report referring to the consultation on 18 September 2017 does note that for the past few weeks Mr Goodwin has had pain in his lumbar spine, left inguinal region and occasionally the left lateral calf and foot adding "which he now claims since the hydrodilatation".

42. The respondent repeated the submission that Mr Goodwin said he had severe pain within 48 hours after the hydrodilatation and in this time he is seeing doctors and having treatment, yet there is no explanation why such symptoms were not recorded contemporaneously[33]. Counsel submits that thereafter the history becomes that the back pain commenced straight after the hydrodilatation procedure. It was argued that the opinion about causation is only as good as the history upon which the opinion is based, and that the history is seriously flawed.

43. In relation to Dr Bodel's opinion, the respondent submits due to a series of errors in those reports the doctor's opinion cannot be relied upon. I accept this submission for the reasons given below.

44. The respondent contended that section 60(3) of the 1987 Act requires treatment accounts to be properly verified and the treatment by remedial massage therapist, Mr Freeman, is not verified and so the respondent is not liable for his treatment[34].

[29] ARD p 542.
[30] ARD p 561.
[31] ARD p 600.
[32] ARD p 575.
[33] T59.
[34] T50.12.

Determination

45. Mr Goodwin's counsel referred to various cases dealing with conditions that have been found to have been consequential to a work-related injury. These include *Bouchmouni v Bakhos Matta t/as Western Red Services*[35] and *Kumar v Royal Comfort Bedding Pty Ltd*[36]. However, there is no real issue regarding the legal principles to apply. The difficulty that Mr Goodwin faces is the issue identified by the respondent in its submissions regarding the lack of contemporaneous corroboration in the treating records with Mr Goodwin's assertion that he suffered back pain within 48 hours of undertaking the physiotherapy treatment with the pulley system after the hydrodilatation procedure on 12 April 2017. In addition, the respondent submits that there is no explanation for this omission and, also, that the doctors who have later provided opinions have not been aware of the lack of documented back pain in the period Mr Goodwin asserts it came on.

46. Various cases of appellate authority have reminded first instance decision makers to consider treating records carefully. In *Davis v Council of the City of Wagga Wagga*[37] at [35] His Honour Mason P stated:

> "Experience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury. It is possible, and not merely speculatively so, that Dr Middleton misunderstood the precise mechanics of the immediate antecedent of the fall."

47. In *Mason v Demasi,*[38] the Court of Appeal explained why apparent inconsistencies should be approached with caution and at [2] identified a number of issues that could have affected the records being inconsistent with the plaintiff's oral evidence. In *Rainbow Group Pty Limited v Carrabs*[39] at first instance I had to consider these authorities and the general practitioner's records, but in that case the worker explained how he had told his doctor about problems he had developed consequentially in his shoulder from using crutches after back surgery and that the doctor had responded that the pain should go away. The general practitioner also provided a report supporting the causal link, acknowledging he had said to Mr Carrabs that the shoulder pain should go away and when it did not, he investigated it. In *Carrabs* this evidence, explaining the gap in the records, was an important factor leading to the acceptance of Mr Carrabs' assertions. In Mr Goodwin's case the respondent submits the gap in treating records has not been explained.

48. The facts in *Carrabs*, *Davis* and *Mason* differ from that in Mr Goodwin's case. Obviously, each case turns on its own facts. However, the principles discussed in those cases need to be borne in mind and require me to undertake a careful consideration of the early treating evidence in this matter as well as Mr Goodwin's statements and the expert evidence.

49. Mr Goodwin has the onus of proof. In *Nguyen v Cosmopolitan Homes*[40] McDougall J stated at [44]:

> "A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712."

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[35] [2013] NSWWCCPD 4, *Bouchmouni*.
[36] [2012] NSWWCCPD 8, *Kumar*.
[37] [2004] NSWCA 34, *Davis*.
[38] [2009] NSWCA 227, *Mason*.
[39] [2019] NSWWCCPD 58, *Carrabs*.
[40] [2008] NSWCA 246, *Nguyen*.

50. It is the respondent's contention that Mr Goodwin has not discharged his onus of proof because of the issues referred to above.

51. It is necessary to consider carefully Mr Goodwin's statements to ascertain what he contends the facts were. Both counsel submitted in detail about the statements. There are three statements dated 9 October 2018, 9 March 2020 and 22 September 2020 respectively. Mr Goodwin has worked in the building industry his entire working life. He is now aged 55. He commenced the respondent company in 1994 and has worked thereafter in the business as a working director.

52. It is useful to collate the evidence for each period as follows:

Prior history of lumbar symptoms

53. In his first statement, Mr Goodwin refers to having had a back injury about 28 years earlier, but he says the pain was at a higher level in his spine than he experiences now. However, the records from Dr Bull, his earlier general practitioner, record a complaint of left hip pain on 30 July 2013 and that Barry Freeman was helping with both right and left hip pain and tightness. This entry refers to him having had a previous x-ray and that he was told he had arthritis but that he did not accept that nor did Barry, and massages and stretches help[41]. Mr Goodwin's first statement does not refer to this entry and it is relevant because his current claim does involve pain being described, at times, in the hips. Furthermore, Dr Bull notes on 20 June 2014 that Mr Goodwin continued to suffer with pain in the coccyx/sacrum over the prior three months that was worse with sitting and then on standing. It was noted that there was no radiation or sciatica and the reason for visit was recorded as involving two areas of the spine:

> "Coccygeal pain/sacrum
> L4/5".

54. In this examination, it was noted by the doctor that there was some L4/5 tightness centrally and also in the right para-lumbosacral area. An MRI scan of the lumbar spine was requested. It was noted that the pain was persistent and there had been no injury.[42] In the entry on 4 July 2014 Dr Bull records the symptoms are the same and he was still tender in the coccyx. It is also recorded "results discussed. MRI L/S SI jts coccyx L3/4 +L4/5 disc fissures". It is also recorded that he had seen Barry Freeman who had helped with core strength exercises.

55. I find it is of some concern that Mr Goodwin did not mention in his first statement having had an MRI scan of his lumbar spine in 2014. The impression he gives in this statement at [12] and [13] is that he had no other issues with his back. He says he fully recovered from the back injury 28 years earlier, but he does not mention the treatment in 2013/2014.

56. A copy of this MRI scan says it was requested on 20 June 2014, undertaken on 24 June 2014 and the report is dated 30 June 2014[43]. The clinical history is "3 months pain sacral area also coccyx, no injury". The radiologist found "Mild degrees of disc degeneration consistent with age between L3 and S1 without focal protrusion although there are left posterolateral, annular fissures at L3/4 and L4/5." There was no neural compromise.

57. It also appears in 2010, Mr Goodwin had right hip pain as Mr Peter Lee, physiotherapist, wrote a referral on 6 May 2010 to Dr Hansra noting he had ongoing right hip pain and an MRI was done showing an FAI with likely impaction of the anterior femoral neck region with the anterior labrum and sublabral cyst and bone oedema. I infer FAI means "femoroacetabular

[41] ARD p 52.
[42] ARD pp53/54.
[43] ARD p 102.

impingement". Mr Lee recommended an orthopaedic review and copied his report to Dr Verheul, orthopaedic surgeon and CGU workers compensation[44].

58. While there are no other entries about his prior lumbar problems, none of the treating doctors or Dr Bodel, who has been qualified as an expert for Mr Goodwin, refers to this MRI scan report. This omission by Mr Goodwin leads me to be concerned about the reliability of his statements and his recollection.

59. In his first statement, Mr Goodwin also describes an injury to his left shoulder in 2010, for which he had extensive surgery. There are quite extensive records about this surgery which I do not propose to summarise as they do not assist in the determination of the issues I have to decide.

Period following injury to 12 April 2017 (hydrodilatation procedure)

60. Mr Goodwin describes in his first statement the accepted right shoulder injury on 30 November 2016, and he describes having surgery for his right shoulder injury on 23 December 2016.

61. At [25] of his first statement he says immediately following the surgery he had for his right shoulder on 23 December 2016 he "suffered additional tightness in his lumbar area *and advised my doctors.*" (my emphasis)

62. He adds "I remained on heavy painkillers. I was told the thoracic pain was considered as typical of referred shoulder pain". It needs to be borne in mind that Mr Goodwin is not bringing a claim in relation to his thoracic spine in these proceedings. He then states at [26] "From January to March 2017 I suffered from back pain on a constant basis unless I remain medicated." At [27] as he says after this surgery, he underwent extensive physiotherapy. He adds "I had developed increasing pain and stiffness in my right shoulder, right thoracic and lumbar area…"

63. In his second statement he describes that following the surgery he was heavily medicated, and he adds:

> "I also noticed pain and discomfort in my lower back. It was at the time bearable. I was concerned by the occasional minor back ache and I did advise Employers Mutual over the phone that I was having discomfort on my right (upper and lower) side that I didn't have prior to the shoulder injury.[45]"

64. In his third statement Mr Goodwin does not really deal with this period as he has put the heading "The difficulties I have had with my lower back since the onset of symptoms in mid-2017."

65. However, at [5] he does say:

> "When I developed pain and discomfort in my lumbar spine, the pain was quite debilitating. I suffered from referred pain into my left leg and foot. On occasions my left foot and leg cramped and became numb. The symptoms continued to get worse over time."

[44] ARD p 606.
[45] ARD p 8.

66. This seems inconsistent with his earlier statement that initially his back pain was bearable and so I consider this paragraph relates to the period after the hydrodilatation procedure.

67. Mr Cameron Bulluss, physiotherapist from Advanced Physiotherapy, first saw Mr Goodwin on the day of his right shoulder injury on 30 November 2016[46]. The entries for 7, 13, 15, 28, 29 and 31 December 2016, 3, 6, 9 , 12, 17, 20 and 25 January 2017, and 1 February 2017 do not refer to lumbar symptoms. It seems the use of the pulley system began on 1 February 2017 as the notes refer to various exercises involving the pulley[47]. On 3, 7, 9, 10, 14,15, and 27 February 2017 do not refer to the lumbar spine. On 1 March 2017 it is noted that Mr Goodwin and his wife are going away next week, and he is told to remember to pack his pulley pack. It is also noted "going ok woke up in awkward position and tight through back. Shoulder exercise going well.[48]" I asked the respondent about this entry and its counsel responded that it is a totally different situation to wake up and feel back pain from sleeping awkwardly to developing it from using the pulley system. This seems a logical proposition and I accept this submission. The physiotherapy entries for 6, 8, 10, and 13 March 2017 do not refer to the lumbar spine. On 13 March 2017 it is noted that Mr Goodwin bashed his shoulder against the doorway in the night and over the weekend it has stiffened up a little since then "but everything else is going well". So even though the physiotherapy notes often repeat histories from one entry to the next, new things are added. But there is no mention of the lumbar spine on 15, 17, 20 , 22 and 27 March 2017 even though the pulley was being used for various exercises. On 27 March Mr Hook, another physiotherapist at Advanced Physiotherapy, noted "going well today. More driving and moving-feeling more confident."[49]

68. On 31 March 2017, Mr Hook noted that Mr Goodwin had "been at work feeling stiff had been away last night on very hard bed." But there was no mention of the lumbar spine. In the next entry for 3 April 2017 Mr Hook notes that Mr Goodwin was feeling stiff from the driving he was doing for work and adds "exercises going well feeling can get more range with pulleys now"[50]. On 6, 7 and 10 April 2017 further sessions are recorded, also with no mention of the lumbar spine.

69. In the general practitioner's records, it is evident Mr Goodwin commenced being treated by Dr Anthony Edwards on 1 December 2016 for the right shoulder injury. The clinical entries for 21 December 2016 and 1 February 2017 are quite detailed and do not refer to the spine, nor do entries on 1 and 29 March 2017[51].

70. In Dr Jai Kumar's report dated 6 December 2016 there is no reference to lumbar pain[52]. Mr Goodwin was noted to be a healthy and well-muscled male. Dr Kumar is the treating orthopaedic surgeon. I find it is not surprising that Dr Kumar does not record lumbar pain as this was only a week after the right shoulder injury and the doctor refers to Mr Goodwin having seen the physiotherapist Cameron Bulluss who diagnosed a rotator cuff tear. So, at this stage Mr Goodwin had not undertaken much, if any, treatment for the shoulder.

71. Dr Kumar, in report dated 22 December 2016, records that Mr Goodwin underwent the right shoulder arthroscopy that day, noting he had full thickness tears of his subscapularis and supraspinatus biceps tendinopathy. Dr Kumar states that Mr Goodwin will commence rehab as per his protocol under the guidance of Advanced Physiotherapy.[53] In report dated 17 January 2017 Dr Kumar advises that Mr Goodwin is continuing physiotherapy under Cameron Bulluss with passive range of motion up to the six week mark and then active

[46] ARD p 533.
[47] ARD p 538.
[48] ARD p 542.
[49] ARD p 548.
[50] ARD p 549.
[51] ARD pp 62/63.
[52] ARD p 167.
[53] ARD p172.

assisted range of motion.[54] At the six week mark, Dr Kumar reported on 31 January 2017 that as Mr Goodwin was quite stiff he wanted the sling discarded and for Mr Bulluss to push active assisted range of motion via a pulley system. Dr Kumar stated Mr Goodwin could use his right arm as tolerated with a maximum lift of 2kg up to shoulder height, but no activity above his head[55].

72. Mr Hook wrote to Dr Kumar on 21 March 2017 reports on Mr Goodwin's progress making no mention of the lumbar spine[56]. On 21 March 2017 Dr Kumar reported to Dr Edwards having seen Mr Goodwin. After describing the treatment of the right shoulder Dr Kumar states "With respect to the rest of Guy's health he is noticing some increasing pain in his left shoulder". I find it is more likely than not that had Mr Goodwin told Dr Kumar that he had developed lumbar symptoms, Dr Kumar would have recorded it, as he had with the left shoulder. This is especially as Dr Kumar then proceeds to set out his opinion regarding Mr Goodwin's work restrictions[57]. I also find it is more likely than not on the balance of probabilities that Dr Kumar would have referred to a lumbar problem when he was discussing the work restrictions. On 11 April 2017 a further report from Dr Kumar does not refer to his lumbar spine[58].

73. Therefore, I find Mr Goodwin's statement that refers to him suffering lumbar pain after the right shoulder surgery and that he told his doctors about this is unreliable. I do not find it plausible that if he had back pain and, as he stated he told his doctors about it, that it would not have been recorded in this period by Dr Edwards, the physiotherapist or Dr Kumar as there were many consultations, as noted above in this period. This is another reason why I consider Mr Goodwin's evidence may not be accurate.

Period from 12 April 2017

74. Mr Goodwin recounts in his first statement that he had the hydrodilatation procedure on 12 April 2017. The nature of this procedure is explained by the report dated 12 April 2017 from Hunter Radiology[59]. It states that under ultrasound guidance a needle was advanced into the right shoulder joint using a posterior approach and 5ml of Lignocaine, 1ml of Celestone and 12mls of Saline was injected without complication.

75. Mr Goodwin states:

> "Immediately following hydrodilatation, I attended physiotherapy and was instructed to extensively use a pulley at home to raise my arm above my head as exercise for the next 48 hours to stretch my shoulder muscles which placed pressure on my back."

76. However, in the next paragraph Mr Goodwin is more specific as he says that he:

> "developed pain in his left buttock which radiated down painfully through my leg into my left foot and caused extreme cramping. This pain came on within 48 hours of undergoing the hydrodilatation where I was extensively using a pulley for physiotherapy. **The resultant pain increased to the point I could not sit**. I was placed on Lyrica and Mobic and remained on tramadol as I could not sleep due to pain." (my emphasis)

[54] ARD p 173.
[55] ARD p 178.
[56] ARD p 182.
[57] ARD p 183.
[58] ARD p 190.
[59] ARD p 112/113.

77. Mr Bulluss saw Mr Goodwin on 12 April 2017 one hour after the hydrodilatation and it appears the same regime of exercises were given involving the use of the pulley[60]. On 13, 19, 21, 24 and 26 April 2017, and 1 May 2017 Mr Hook treated Mr Goodwin but there is no mention of lumbar or leg symptoms. On 3 May 2017 Mr Hook adds to the notes "feeling good no issues, 6-month gym membership approved[61]". On 5, 15 and 17 May 2017 further sessions are recorded by Mr Hook. In the later one he adds "feel good today been painting at work and tolerating well."[62] On 19 May 2017 Mr Hook records "busy at work did a lot more, upgrades duties. 3 x 8 hr days. 10kg lifting close to body.[63]" Still there is no mention of the lumbar spine. Further sessions take place on 22, 26 and 29 May 2017 and in the later one Mr Hook notes "everything going well. No issues with gym program".[64]

78. If within 48 hours of the physiotherapy treatment after the hydrodilatation injection, and Mr Goodwin had pain to the point where he could not sit, I find it is totally implausible that he would not have alerted the physiotherapist to this. I also find that the physiotherapist's notes referring to everything going well are contrary to Mr Goodwin's assertions about the development of lumbar pain because of the physiotherapy treatment.

79. On 2 June 2017, Mr Hook records "everything going well. Was sore in back following work on wed so didn't go to gym".[65] This entry raises concerns. Mr Goodwin's account was that he had severe lumbar pain within 48 hours after the hydrodilatation procedure and subsequent physiotherapy. Given he was seen for treatment so many times by the physiotherapists and Dr Edwards, and they each note other matters when they cropped up, one would have expected to see some reference to the lumbar pain had it occurred how Mr Goodwin attests in his statements. The other reason this entry raises concerns as it is the first mention of back pain after the right shoulder was injured on 30 November 2016 and it quite clearly states that Mr Goodwin was sore in his back *following work*. This is not the case Mr Goodwin is advancing in these proceedings.

80. Even if back pain came on after work, and therefore may be in theory a separate compensable injury, it makes a difference to his entitlements as to the cause of that injury. A separate injury, for instance, would have a different date of injury and would give rise to differing entitlements than if Mr Goodwin has a lumbar condition that is consequential to the right shoulder injury and so bearing the date of injury 30 November 2016. There is no claim for lump sum compensation in these proceedings but that is one type of compensation that could be affected by the determination in this matter. So, while this claim only involves $2,792.25 of section 60 expenses in relation to the lumbar spine, the determination of the causation question is important to both parties. This is why I have taken pains to summarise the evidence in a chronological fashion so as to carefully consider both parties' submissions.

81. I find it is beyond belief that if Mr Goodwin had the level pain he refers to after 12 April 2017 that he would not have told the physiotherapists and Dr Edwards, especially as he had so many treatment sessions. He perhaps has gone some way to explain why there is no record of the back pain before 12 April 2017, because he says it was "bearable", but he did also give evidence in his first statement that he told his doctors of it. However, he has not attempted to deal with the failure of any of the treating practitioners, being Dr Edwards, the physiotherapists and Dr Kumar to have a record of the severe pain he says he suffered within 48 hours of the treatment after the hydrodilatation injection.

[60] ARD p 551.
[61] ARD p 554.
[62] ARD p 556.
[63] ARD p 556.
[64] ARD p 558.
[65] ARD p 558.

82. A detailed entry by Dr Edwards on 26 April 2017 refers to Mr Goodwin having stiffness in his shoulder and right lateral neck and having a CS injection but there is no mention of the lumbar area[66]. There is also no reference to the lumbar spine in consultations on 19 May and 28 June 2017. On 5 June 2017 Mr Hook notes "everything going well"[67]. On 9 June 2017 he had another session. On 16 June 2017 Mr Goodwin saw Mr Bulluss who writes "Doing well, 6 months post-op"[68] and on 19 June 2017 Mr Bulluss notes the "rehab lady called today said happy with everything".

83. On 20 June 2017, Dr Kumar reported to Dr Edwards as follows:

> "I have seen Guy, now 3 months after his hydrodilatation. lt has afforded him excellent relief of his stiffness and pain. He ls not yet at full function but is progressing well and still has room for improvement.
>
> I have increased his duties to allow a maximum lift of 10kg and maximum push/pull of 10kg and have increased his hours to normal hours. I will see him back in 12 weeks' time hopefully for a final check and clearance for pre-injury duties.
>
> I would like his physio to continue up until then."

84. The above report from Dr Kumar makes no reference to Mr Goodwin experiencing lumbar pain[69]. One would expert an orthopaedic specialist to record such a complaint, especially when he is considering an increase in Mr Goodwin's work duties and a continuation of the physiotherapy treatment. If Mr Goodwin had pain to the level he could not sit, in my view, it beggars belief that he would not have informed Dr Kumar of it.

85. On 23 June 2017, Mr Hook notes "everything going well no issues"[70] and on 26 June 2017, he writes "all going well. Did a lot of painting OH today at work"[71]. The further consultation with Mr Hook on 30 June 2017 also does not mention lumbar pain. On 3 July 2017, Mr Hook records "did a lot of drilling today little stiff reaching to put belt on behind back." But still there is no mention of lumbar symptoms. Nor is there on 7 July 2017. On 10 July 2017, Mr Hook writes "going well no real issues with shoulder. Still very stiff into HBB getting slight pain in right rib still"[72]. This entry again illustrates that Mr Hook does record issues apart from the shoulder when he is told of them. On 12 July 2017, there is no mention of back issues. However, on 17 July 2017 Mr Hook adds "been taking some meds for his back/hip pain shoulder has been feeling better with it." This is the first reference to back or hip pain after the reference to him being sore in the back on 2 June 2017 when it was said to be following work. In this entry of 17 July 2017, there is no history of the back/hip pain being related to the exercises with the pulley. On 24 July 2017, Mr Hook records "still getting the ?hip/Lsp pinch with EOR ER in ABD 90"[73]. On 31 July 2017, Mr Hook notes "feeling alright following busy day at work. exercises going well"[74]

[66] ARD p 63.
[67] ARD p 559.
[68] ARD p 560.
[69] ARD p 195.
[70] ARD p 561.
[71] ARD p 562.
[72] ARD p 564.
[73] ARD p 566.
[74] ARD p 567.

86. The first mention in the general practitioner's clinical notes seems to be on 26 July 2017, when Dr Edwards records "had developed R Lower th/upper lumbar back muscle tightness, having some distal effects on thigh muscles. Physio has been working these out with massage, [G]uy has started to do his own stretching". Dr Edwards adds "the manual physio to work out shoulder scar tissue has likely caused this back muscle irritation". He adds that Mr Goodwin is to continue to see the physio for both the shoulder and back. The doctor said he wrote a certificate of capacity to include the shoulder/back.

87. In an undated copy of the WorkCover NSW- certificate of capacity which deals with capacity from 21 July 2017 to 18 August 2017 and refers to the next review being on 16 August 2017, Dr Edwards has added to the box "How is injury/disease related to work?" the following:

> "caused by work related injury - sliding beam laterally caused sudden shoulder injury physiotherapy- extensive, manual - to shoulder muscles have irritated back muscles causing muscle spasms/tightness[75]"

88. Dr Edwards also describes the work-related injury as follows:

> "Suscapularis [sic] full thickness tear, secondary irritation upper lumbar musculature/ facet joint arthropathy [sic]".

89. Interestingly, on many of the WorkCover NSW- certificates of capacity Dr Edwards puts in the box "factors delaying recovery" the following "slow healing, scar formation, capsulitis, muscle spasms". It is difficult for me to infer that this reference to "muscle spasms" relates to the lumbar spine because this entry appears on all the seven certificates issued dealing with the period covering 1 February 2017[76] until the above certificate. And it is only from the above certificate, and those issued thereafter, that there is mention of the lumbar area.

90. On 14 August 2017, Mr Hook notes "shoulder good no issues. Work good felt able to be able to push plank and slide plank. Gym going good no issues. Got up to 25kg himself in the gym and 8kg curls, arm ergo[77]"

91. On 16 August 2017, Mr Hook notes "little sore following unloading truck, doing 75% functionality at work".[78]

92. On 23 August 2017, Dr Edwards requested an MRI scan of Mr Goodwin's lumbar spine which was undertaken on 8 September 2017[79]. Disc protrusions were noted at various levels with the radiologist stated there was no neural compromise. The clinical history on the report was lumbar back ache and reduced range of movement.

93. On 28 August 2017, Mr Hook noted "still getting issue with ?lat/facet jts. Dr sent mri request for it to WC"[80] and on 30 August 2017, Mr Hook adds "going alright had very heavy day at work shovelling"[81]. On 4 September 2017, Mr Hook refers to Mr Goodwin "still getting LBP/Hip referral into R side" and on 11 September 2017, Mr Hook records "got pain killers for left hip. on a pain block? And neurofen, getting in and out of car is the worse for the pain"[82]

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[75] ARD p 373.
[76] ARD p346.
[77] ARD p 569.
[78] ARD p 569.
[79] ARD p 637.
[80] ARD p 571.
[81] ARD p 572.
[82] ARD p 573.

94. On 12 September 2017, Dr Kumar saw Mr Goodwin and reported to Dr Edwards:

> "I am pleased to report that his shoulder has returned to near normal function and he enjoys good range of motion and a strong shoulder. Unfortunately after his hydrodilatation and therapy; he has noticed an increase in pain across his back which is becoming increasingly debilitating. He has been treated for zp joint irritation as well as some suggestion of fascial tightness."

95. Dr Kumar added the fact that the back pain occurred during the treatment for his Workcover claim he thinks it is reasonable to be considered under the Workcover scheme[83]. In the referral to Dr Ferch dated 12 September 2017, Dr Kumar said that Mr Goodwin "during the course of his rehabilitation noticed increasing pain across the belt line and into his back. This is now debilitating, causes pinching sensations and spasms down his back[84]"

96. Mr Bulluss and Mr Hook wrote a joint report to Dr Kumar which must have an incorrect date of 17 August 2017, as they refer to review of Mr Goodwin on 18 September 2017. It is stated:

> "Guy has presented for the past few weeks now with pain in the lumbar spine, left inguinal region and occasionally the left lateral calf and foot, which he claims have been since the hydrodilatation.
>
> Assessing Guy's lumbar spine has been challenging but it is clear that the back is involved, with a significant reduction in lumbar flexion. There was some groin pain brought on internally rotating his hip at 90 degrees flexion, suggesting possible hip involvement. There was a positive straight leg raise when tested once, but this has not been consistent.
>
> It is possible that he has radicular pain, in spite of no evidence of this on the MRI. I can't see direct link that we can see between the hydrodilatation procedure and low back pain.
>
> I have attempted to educate Guy on radicular pain and have informed him that there is no direct link in my view between the shoulder and low back.[85]"

97. This account is significant because it is from the physiotherapists who have been treating Mr Goodwin since the time of his injury. It dates the complaints about lumbar symptoms well after the treatment commenced after the hydrodilatation procedure on 12 April 2017. There is no mention of a history that the pain came on after the use of the pulley system, just after the hydrodilatation procedure.

98. Dr Edwards' referral to Dr Ferch is dated 28 September 2017[86] and refers to the "new onset L lumbar back pain and radicular features since post-surgical shoulder hydrodilatation therapy and mobilisation." Dr Edwards sets out in detail the worsening lumbar symptoms of Mr Goodwin. Under the heading "past problems" there is no mention of prior back symptoms. Under the heading "current problems" the date given for the low back pain is 8 September 2017 and back and leg pain 13 September 2017. It is not until 15 September 2017 that Mr Goodwin tells Mr Bulluss that his lumbar pain started the day after the hydrodilation injection. Mr Bulluss notes he had very limited lumbar movement and queried hip pathology.[87]

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[83] ARD p 200.
[84] ARD p 201.
[85] Reply pp17/18.
[86] ARD p394.
[87] ARD p 574.

99. Dr Ferch in his report dated 10 October 2017 outlines the following history:

> "As you know Guy has been troubled by low back and left lower limb pain. He experienced a shoulder injury for which he underwent surgery in 2016. During the course of rehabilitation following this, Guy was utilising a pulley system to elevate his right shoulder and facilitate mobility within his shoulder. He experienced increasing low back pain whilst undertaking the exercise and underwent treatment with physical therapy including traction, massage and manipulation. Despite this Guy has been troubled by increasing low back pain in addition to pain radiating into his left lower limb. The pain initially radiated from his buttock into his lateral thigh but he then developed pain radiating further down his leg into his posterior calf."

100. The difficulty that the respondent submits with this history is that it does not accord with Mr Goodwin's statement that he had some lumbar pain before the hydrodilation and then with 48 hours it was severe. Also, Dr Ferch does not query the history that Mr Goodwin experienced the pain while undertaking the exercises with the pulley. It is inconceivable to me that had this been the case Mr Goodwin would not have told the physiotherapist at the time and consideration being given whether to persist with that type of treatment, particularly since Mr Goodwin says the pain was severe. Also, I am concerned that Dr Ferch does not know about the lumbar pain experienced by Mr Goodwin when doing his work. It is difficult for me to be persuaded by Mr Goodwin's counsel's submissions when all the specialists have not considered the contemporaneous records, particularly of the physiotherapists and also of Dr Edwards.

101. Dr Ferch refers to what he calls a recent lumbar MRI scan which he said confirmed degenerative change at L5-S1 level but no compromise of the S1 nerve. This caused the doctor to state that the mechanism for his left lower limb pain is not clear on the basis of this MRI, so he sought nerve conduction studies to see if there was a cause outside his spine. In the report dated 28 November 2017 Dr Ferch advises Dr Edwards that the nerve conduction studies do demonstrate an L5 and S1 radiculopathy[88]. Dr Ferch sought to do a pelvic x-ray to again see if there was a cause outside his spine.

102. Dr Ferch in his report dated 24 Janaury 2018 referred to a recent MRI scan which showed a sequestrated disc fragment at L5/S1 which was not evident on the earlier scan. He said this was on the left side and could be associated with irritation to the descending nerve root[89].

103. I have read but will not summarise the further physiotherapy notes, Dr Edwards' notes or reports such as from Dr Tame. As they do not assist me with the determination of causation. For instance, Dr Tame does not consider the issues raised above regarding causation working from the history given to him.

104. On 4 April 2018, Dr Edwards referred Mr Goodwin to Dr Michael Mock, a physical medicine practitioner, for an opinion about causation. Dr Edwards wrote the following:

> "Thank you for seeing Guy for assessment of L L5Sl radiculopathy which seemed to occur in the follow up rehab stretching/ hydrodilatation after surgery for work related injury to R shoulder. He injured the shoulder late in 2016 and required surgery - Dr Jai Kumar (Newcastle). He developed capsulitis needing hydrodilatation and stretching by the physiotherapist (Advanced Physio, Warners Bay). Mr Goodwin reports that in the days following the stretching he

[88] ARD p 203.
[89] ARD p 204.

> experienced increasing back muscle tightness and pain which developed into significant lumbar and sciatic pain then radiculopathy, all this despite light duties and reduced hours at work. We specifically request your opinion on causal relationship between shoulder and upper back stretching and onset of lumbar pain/ spasm. He was referred from Shoulder surgeon Dr J Kumar to Orthopaedic surgeon Dr R Ferch and underwent nerve CS showing delay. Subsequent MRI showed sequestrated disc fragment at the appropriate location. I initially referred Guy to your colleague Dr M Creswick unaware that he had retired. I would appreciate your opinion in this matter."[90]

105. Dr Kafataris provided the insurer with an injury management consultant report dated 19 May 2018 which refers to Mr Goodwin having a coexisting lumbar spine injury which has been declined by the insurer. His history is that this first occurred in 2016. However, Dr Kafataris says he advised Mr Goodwin that the alleged back injury was not something he would deal with as he was focused in his role on the capacity for his shoulder injury[91]. He said he spoke to the general practitioner who agreed to issue separate certificates for any restrictions for the lumbar spine injury.

106. Unfortunately, there is no report in the records from Dr Michael Mock regarding causation as requested by Dr Edwards. I do not know if this was proceeded with by Mr Goodwin.

107. On 22 June 2018, Mr Bulluss sent the insurer a report which refers to low back pain with some numbness in the middle two toes on the left foot and pain in the outside of the calf. He says these symptoms have been present since approximately mid- 2017 and have not improved. This aggravated by bending or twisting and by wearing his nail bag. It is also aggravated by prolonged sitting. This is consistent with the S1 nerve root compression reported on 14 December 2017. Mr Bulluss states:

> "The low back is not appropriate for Exercise Physiology. Guy feels that the low back problem is directly related to the shoulder. While this may or may not be the case, it would be quite unusual, and I have suggested to Guy that he discuss whether this may be dealt with as a separate claim with yourself and his general practitioner. The ongoing low back pain is a major factor in his inability to upgrade his work duties. It is recommended that this is managed by a senior Physiotherapist with a good understanding of this pathology.[92]"

108. The records of the osteopath, Graham Young, were tendered at the arbitration hearing. They have been read by me and do not particularly assist in determining the causation issue in relation to the lumbar spine because the initial consultation was on 27 October 2018 and it is common ground that Mr Goodwin complained of back pain before then. The site of the pain was identified in that first consultation as right lumbar spine sacroiliac pain and the right side is also marked on the body diagram. In subsequent consultations there is reference to leg pain, the handwriting is hard to read, the reference may be to the left leg.

Dr Bodel

109. Dr Bodel has been qualified by Mr Goodwin's solicitors and has supplied reports dated 28 May 2018, 11 September 2018, 2 April 2010 and 19 November 2020. In his first report he has the following history:

> "Unfortunately this hydrodilatation did not help the shoulder but it also caused a further injury. This gentleman had been complaining of some intermittent "back pain" and when he localised that prior to the surgery on the right

[90] ARD p 435.
[91] ARD p 248.
[92] ARD p 257.

> shoulder it was at the thoracolumbar junction and on the right side of the lower ribcage.
>
> After the hydrodilatation procedure he developed severe back pain and left buttock pain and pain that went down all the way to the left foot and that came on within 48 hours of the hydrodilatation procedure".

110. Dr Bodel does not have a complete history about Mr Goodwin's prior back problems, nor does he demonstrate a detailed knowledge of his treatment and the issues raised by the respondent. His recount of Mr Goodwin's treatment is fairly broad brush however, Dr Bodel does advise that the history from Mr Goodwin was difficult to elicit. He adds that it became apparent that the onset of back pain with left sided sciatica pain came on soon after the admission for the hydrodilatation procedure on the right shoulder. He says, "I am not certain this was appreciated by anybody else who has seen him particularly Dr Miniter", he calls his assessment incomplete.

111. However, I find that Dr Bodel himself, in this report, does not display an understanding of how Mr Goodwin has framed his case. He does not deal with the pulley treatment. Dr Bodel just says the sciatica came on after the hydrodilatation procedure. He said this was caused by the admission to hospital for this procedure. Dr Bodel does not even seem to have understood the procedure was performed by Hunter Radiology and within an hour Mr Goodwin was having the physiotherapy treatment. In fact, Dr Bodel acknowledges that he has not seen the documentation to confirm this procedure[93]. He also states he has not seen the treating reports. Dr Bodel does not explain how injections into the shoulder could cause a lumbar condition. He gives no reasoning or analysis in this report.

112. The report dated 11 September 2018 was prepared without a further consultation with Mr Goodwin. Dr Bodel lists the treating records he was given, and they include those from Advanced Physiotherapy. However, Dr Bodel does not refer to them and when he is discussing Dr Ferch, he only refers to the cervical spine. This report does not deal with the lumbar spine.

113. In the third report dated 2 April 2020 again Dr Bodel does not examine Mr Goodwin. He refers to the solicitors' letter dated 30 March 2020 which apparently enclosed two statements and detail in regard to Mr Goodwin's medical management. Dr Bodel states:

> "This included the recommended use of the pulley system, which he has demonstrated in the colour photograph that has been provided. I also note that while undertaking this recommended exercise, which he did up to six times a day with repetitions of ten exercises each time, that his back was in a twisted position, which is inevitable when trying to undertake that manoeuvre."

114. Dr Bodel expresses the opinion that Mr Goodwin's prior back complaint was further aggravated by this activity and caused aggravation of his underlying degenerative change. However, Dr Bodel does not have full details of the prior back complaints but of more concern he does not seem to have read the physiotherapy notes which do not bear out Mr Goodwin's statements that he had severe back pain within 48 hours after the hydrodilatation and pulley treatment.

115. Apart from the back injury 28 years earlier, the history Dr Bodel had in his first report was:

> "This gentleman had been complaining of some intermittent "back pain" and when he localised that prior to the surgery on the right shoulder it was at the thoracolumbar junction and on the right side of the lower ribcage."

[93] ARD p 32.

116. The problem with this history is that it does not marry up as being the site where Dr Bodel is finding aggravation which he identifies later in this first report as L5/S1.

117. Then Dr Bodel states:

> "The L5/S1 disc pathology is likely to be constitutionally based and has been present for some time because of the heavy nature of the work that he has done over many years. The hydrodilatation procedure instigated further surgery in the lower part of the back and he twisted posture that he adopts while using the pulley system has caused further aggravation, acceleration, exacerbation and deterioration of that disease.[94]"

118. Dr Bodel says the "hydrodilatation procedure instigated further surgery in the lower part of the back." This is not factually correct as Mr Goodwin has not had any surgery to the lower part of his back.

119. Dr Bodel issued his fourth report dated 19 November 2020 again without speaking to Mr Goodwin. The solicitors sent him the ARD and Reply. However, again this report has errors. Dr Bodel says "he then injured the right shoulder and back on 30 November 2016. He was lifting the end of an I-beam. The right shoulder was the main area of complaint at that time, but he also has thoracolumbar and lumbosacral pain." It is not Mr Goodwin's case that he sustained a frank injury to his lumbar spine on 30 November 2016.

120. Dr Bodel's next error is that he says the hydrodilatation procedure was after the second surgery on the left shoulder. I would have assumed the reference to the left shoulder was a typographical error however, given the doctor says it was after the second surgery to the shoulder he cannot be referring to the right shoulder as it has only had one surgery whereas the left had two. The further error is the repeating that the hydrodilatation procedure instigated further surgery in the lower part of the back. This is just not correct. Mr Goodwin has not had surgery to his back, let alone "further surgery".

121. There is an internal inconsistency in the report because when Dr Bodel discusses Dr Ferch, he says he cannot comment on his recommendations for treatment because it is two and a half years since he saw Mr Goodwin. But then he states when he examined Mr Goodwin there was no clinical sign of radiculopathy and therefore surgery would be unlikely to be of benefit. Yet, as I have noted above. Dr Bodel had just stated that the hydrodilatation procedure instigated further surgery in the lower part of the back.

122. Finally, Dr Bodel when asked to comment on Professor Miniter's opinion says:

> "This is a difficult question.
>
> I have not had the opportunity to view this gentleman clinically since May 2018.
>
> Professor Miniter had the opportunity to write a report about these matters on 22 May 2020 which is only six months ago and he has had the opportunity to examine the patient more recently.
>
> I really cannot comment any more about Professor Miniter's assessment because I have not had the opportunity to review him clinically."

[94] ARD p44.

123. Ironically, this is another error because Dr Miniter does not say he re-examined Mr Goodwin for the purposes of this report.

124. Because of the issues identified by me, all of which were the subject of submissions by the respondent, I find I can place no weight on the opinions expressed by Dr Bodel regarding causation.

125. This presents a significant problem for Mr Goodwin to discharge his onus of proof because Dr Tame does not really provide an opinion regarding causation and the use of the pulley system. Dr Ferch and Dr Edwards have not addressed the conflict between Mr Goodwin's assertions and the contemporaneous clinical records which have been summarised above.

Dr Miniter

126. Dr Miniter, orthopaedic surgeon, has provided reports dated 2 March 2018[95], 18 May 2018[96], 24 September 2018, 27 June 2019[97] and 22 May 2020 for the respondent's insurer. In his first report Dr Miniter has the history that sometime in the late part of 2017 he was using a pulley and the next day he awoke with some central back discomfort and then over the next day or so he had significant left leg pain. Dr Miniter also has the history that Mr Goodwin also had numbness which involved the sole of his foot and the lateral aspect of the left calf[98]. Dr Miniter refers to the October 2017 report of Dr Ferch and to the MRI scan discussed by that doctor. Dr Miniter then refers to a pelvic MRI scan on 14 December 2017 which he said demonstrated some abutment on the L5 and S1 nerve roots, with a contained disc herniation. He also records that a nerve conduction study has suggested chronic neurogenic effects on the L5 and S1 nerve roots.

127. Dr Miniter records his examination findings and accepts Mr Goodwin has lower back pain and left neurogenic symptoms. But he opines that these are in all likelihood due to longstanding problems with his back. He says he fails to see an association between the alleged workplace injury to the right shoulder, its rehabilitation and the subsequent development of neurogenic symptoms in the left leg. He adds that he does believe that Mr Goodwin had a disc prolapse at some point in time in the middle part of 2017. This report fails to expressly consider what the "rehabilitation" of the right shoulder involved and specifically the pulley system.

128. In his supplementary report dated 18 May 2018 Dr Miniter says of his first report that he felt Mr Goodwin's back problems were longstanding, but he did feel that Mr Goodwin had an acute episode of back pain in 2017[99]. Dr Miniter then discusses whether the back pain could be related to the nature and conditions of Mr Goodwin's employment, he thought not because Mr Goodwin said he had not had symptoms for many years. However, I do not need to consider this question further as this proposition is not put by Mr Goodwin in these proceedings. Dr Miniter confirms that he does not believe the rehabilitation treatment from his right shoulder surgery caused the back issues.

129. In a further report dated 24 September 2018 prepared without examining Mr Goodwin again Dr Miniter, states:

> "I do not believe that the cause of this gentleman's symptoms or conditions relating to the lumbar spine are in any way related to the hydrodilatation therapy engaged in April 2017. I also do not believe that it relates to the physiotherapy which was related to the recovery from his right shoulder problem."

[95] ARD p 211 Note the copy of this report in the Reply has page 3 missing. The copy in the ARD is complete.
[96] Reply p 6.
[97] Reply p 11.
[98] ARD p 212.
[99] Reply p 6.

130. Earlier in his report, he refers to the use of the pulley system being part of the rehabilitation treatment, however, the doctor expresses the view that the cause of the back issues was the longstanding prior lower back issues.

131. In a further supplementary report dated 27 June 2019, Dr Miniter deals with the reasonable necessity of treatment which for the reasons discussed earlier I do not need to deal with as I am not persuaded that Mr Goodwin has discharged his onus of proof regarding the allegation of a consequential lumbar condition.

132. In Dr Miniter's report dated 22 May 2020, he considers the statement of Mr Goodwin dated 9 March 2020, Dr Bodel's report dated 4 April 2012 and the MRI scan reports dated 11 September 2017 and 14 December 2017. The doctor refers to the footage of video of the pulley exercises and opines that it did not provide evidence that the lower back had been interfered with as a consequence of these exercises. I was asked to view this video but the respondent submitted that I could not draw my own conclusion about it as this was a matter for medical expert opinion. I accept this submission has merit.

133. Dr Miniter maintains Mr Goodwin has not sustained a consequential back condition despite the contents of his further statement. He opines:

> "The alleged disc prolapse with S1 nerve root compression is more likely than not an unrelated issue. You will note the very clear history that he gave to me of lower back pain and leg pain. Thus, it is highly likely that there was pre-existing pathology."

134. In summary, even if I find Dr Miniter's opinion is not persuasive about his lumbar spine being a constitutional matter, it does not assist Mr Goodwin because his evidence has the problems I have identified and applying the standard In *Nguyen* I do not feel an actual persuasion of the existence of the facts asserted by Mr Goodwin. I find he has not discharged his onus of proof. I do not accept his statement that within 48 hours of the hydrodilatation he felt severe pain in his back. It would be folly on his part to suffer such severe pain and not say to the treating physiotherapist that he had been having such pain. It makes no sense, because if the pulley exercises caused such severe pain that he describes it would have been sensible for him to alert the physiotherapist, Dr Kumar and Dr Edwards so the treatment regime could be reconsidered.

135. The other evidence that is not dealt with by any of the doctors are the matters recorded by the physiotherapist about Mr Goodwin's experiences as he continued to work throughout this time, such as on 2 June 2017 that he "was sore in back following work on wed so didn't go to gym".

136. Accordingly, I find an award for the respondent in relation to the allegation of consequential lumbar spine condition resulting from injury to right shoulder on 30 November 2016.